



**In the
Supreme Court of the United States**

OCTOBER TERM, 1976

NO. 76-942

GLENN W. ANTHONY

Petitioner

versus

WILLIE RUTH ANTHONY

Respondent

APPLICATION FOR WRIT OF CERTIORARI

APPEAL FROM THE SUPREME COURT OF
GEORGIA

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GLENN W. ANTHONY,

Petitioner

versus

CIVIL ACTION

WILLIE RUTH ANTHONY,

Respondent

APPLICATION FOR WRIT OF CERTIORARI

I. OPINIONS BELOW

No previous opinion in this case has been reported either officially or unofficially. All opinions below are appended hereto. The case number in the Georgia Supreme Court was 31472, decided on October 5, 1976.

II. STATEMENT OF JURISDICTION

The petitioner herein seeks review of the order of the Georgia Supreme Court affirming the judgment of the trial court. The order was entered on October 5, 1976.

The petitioner made and filed his Motion for Rehearing on October 12, 1976. The Motion for Rehearing was denied on October 19, 1976.

Title 28, Section 1257 (3), United States Code, grants this Court jurisdiction to review, by means of a Writ of Certiorari,

final decrees rendered by the highest court of a state in which a decision could be had where any right is specifically set up under the Constitution of the United States. The petitioner makes this Application for a Writ of Certiorari, claiming that rights specifically given him by the Constitution of the United States have been denied him in the proceedings below.

III. QUESTIONS PRESENTED FOR REVIEW

The only question presented for review is whether a state may deprive a person of his property without due process of law. Specifically, the question is whether a state court may deprive a property owner of his rights with respect to property owned by him without any notice to the property owner, and without giving him an opportunity to be heard.

IV. CONSTITUTIONAL PROVISIONS

This case involves the Fourteenth Amendment to the Constitution of the United States, found at *USC Const. Amendment XIV, Section 1*: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." *USCA Const., Amend. XIV, Sec. 1*.

V. STATEMENT OF THE CASE

This section was originally filed in the Superior Court of Muscogee County, Georgia, by the respondent, denominated

as Willie Ruth Anthony vs. Glenn W. Anthony, file number 65917. The Complaint was denominated as one for alimony. It was filed on August 15, 1975, and alleged that the petitioner herein, Glenn W. Anthony, was a resident of Muscogee County, Georgia. On August 27, 1975, the respondent filed her amendment to her Complaint, alleging that the Defendant had hidden himself out in the State of Alabama, and could not be served. Additionally, the respondent filed a *lis pendens* on the same date, a copy of which was attached to her amendment and made a part thereof. The respondent stated in her amendment that the purpose of the *lis pendens* was to prevent the Defendant from disposing of his property in Muscogee County, Georgia and to protect her claim to that property. On that same day, August 27, 1975, an Order was entered by the Superior Court of Muscogee County, by Judge Oscar D. Smith, Jr., appointing a receiver to take possession of the petitioner's property in Muscogee County, Georgia, which was described in the *lis pendens*, together with the proceeds, rents, etc., that were derived from the property.

In the same order appointing the receiver, the respondent was ordered to be served by publication in accordance with the statutes of Georgia. Notice of the suit was published in the appropriate journal on the 2nd, 9th, 16th, and 23rd of September, 1975. On September 29, 1975, the petitioner filed his Motion to Dismiss on several grounds, and his Plea to the Jurisdiction of the Court. On October 6, 1975, the Sheriff of Muscogee County, Georgia, entered his *non est inventus*, stating that he had not been able to locate the petitioner within Muscogee County, Georgia. On October 21, 1975, an order was entered overruling the petitioner's Motion to Dismiss the Plea to the Jurisdiction. On November 13, 1975, an order was entered perfecting service on the respondent, and the Final judgment and Decree was entered

purporting to award the respondent fee simple title to all of the petitioner's property, real and personal, in Muscogee County, Georgia.

The petitioner filed his Motion to Set Aside the Judgment rendered on November 13, 1975 on April 30, 1976. That Motion was denied by an order entered on May 28, 1976. It was from that order that the appeal was taken on which the petitioner now applies to this Court for a Writ of Certiorari.

The issue upon which this petition is based was first raised by the petitioner's Motion to Dismiss filed on September 26, 1975. In that Motion, the petitioner moved the Court

"For an order dismissing the order of the Court dated the 27th day of August, 1975, ordering the appointment of a receiver for the purpose of taking possession of the property of the Defendant located in Muscogee County, Georgia on the ground that the same is an unconstitutional procedure in violation of the Constitution of the United States of America and the Constitution of Georgia, constituting a taking of property without due process of law."

The Superior Court of Muscogee County, Georgia, Judge Oscar D. Smith, presiding passed on that question by his order of October 21, 1975, summarily dismissing the petitioner's Motion. The same question was again raised on appeal in the Supreme Court of the State of Georgia by Motion for Rehearing filed on October 12, 1976. The Supreme Court of the State of Georgia passed on the question presented on October 19, 1976, by denying the Motion for Rehearing.

VI. ARGUMENT AND CITATION OF AUTHORITY

MAY A STATE COURT APPOINT A RECEIVER TO TAKE POSSESSION OF A PERSON'S REAL AND PERSONAL PROPERTY AND THE INCOME THEREFROM EX PARTE WITHOUT GIVING HIM NOTICE OF THE SEIZURE AND AN OPPORTUNITY FOR A HEARING.

The pertinent facts are simple. The original action was filed on August 15, 1975. On August 27, 1975, and before service of process upon or notice to the petitioner, a receiver was appointed and was ordered to take possession of the petitioner's property. An order was entered later perfecting service of process by publication upon the petitioner and a final decree was rendered permanently depriving the petitioner of his property. However, the petitioner was afforded no notice whatsoever, and consequently no opportunity for hearing, before he was deprived of his property on August 27, 1975.

The Fourteenth Amendment of the United States Constitution prohibits any state from depriving any person of his property without due process of law. *USCA Const. Amend. XVI, Sec. 1*. "Due process of law" includes the giving of notice of a pending action to the person sought to be deprived, and an opportunity for that person to contest that deprivation before a judicial officer. *Sniodach v. Family Finance Corp.*, 395 U.S. 337, 23 L.Ed. 2d 349, 89 S.Ct. 1820, *Fuentes v. Shervin*, 407 U.S. 67, 32 L.Ed. 2d 556, 92 S.Ct. 1983, *Mitchell v. W. T. Grant Co.*, 416 U.S. 600, 40 L.Ed. 2d 406, 94 S.Ct. 1895, *North Georgia Finishing Co. v. Di Chem.* U.S. , 42 L.Ed. 2d 751, S.Ct. .

The proceedings in the State Court were entirely *ex parte* and notice and an opportunity for hearing was not

ever purportedly given to the petitioner. A receiver was appointed and took possession of the property in question before publication of the Summons was begun, and of the two and one-half months before service was perfected, the record shows affirmatively on its face that the respondent was given no notice or opportunity for a hearing, and that his deprivation of his property was completely void of any constitutional validity.

VIII. CONCLUSION

The petitioner respectfully contends that the Supreme Court of Georgia has decided a federal question of substance, and has decided it in a way in conflict with the applicable decisions of this Court. The petitioner requests that this Court grant a Writ of Certiorari to review the decision of the Court below.

Respectfully submitted this the 4th day of January, 1977.

ARAGUEL & SANDERS

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Attorneys for the Petitioner

CERTIFICATE OF SERVICE

I, Jerry D. Sanders, Attorney for the Petitioner do hereby certify that I have served the Respondent with a copy of the foregoing Petition for Writ of Certiorari by mailing the same in a properly addressed envelope with proper postage affixed thereon to Honorable Milton Hirsch, 1020 Second Avenue, Columbus, Georgia, Attorney of record for the Respondent.

This the 4th day of January, 1977.

ARAGUEL & SANDERS

BY: Jerry D. Sanders
319 Cross Country Plaza
Office Park
Columbus, Georgia 31906

Attorneys for the Petitioner

APPENDIX A
DECISION OF THE SUPREME COURT OF GEORGIA

In the Supreme Court of Georgia

Decided: Oct. 5, 1976

31472

ANTHONY v. ANTHONY

INGRAM, Justice.

This is the second appearance of this case before this court. In *Anthony v. Anthony*, Case No. 30764, decided February 24, 1976, the prior appeal "from the order (of the trial court) denying the defendant's plea to jurisdiction" was dismissed for want of jurisdiction in this court to hear that appeal. Thereafter, appellant filed a motion to set aside the final judgment of the trial court which awarded alimony to appellant's wife. The denial of the motion to set aside the final judgment is the subject of this appeal.

This case began in Muscogee Superior Court when the wife filed a petition for alimony against her husband, the appellant. She later amended her complaint to allege that appellant had absconded to Alabama. Appellant made a special appearance and contended that he had become an Alabama resident. The trial court ordered that appellant be served by publication and appointed a receiver to take charge of his real property in Muscogee County. The final judgment of the trial court granted the wife alimony by awarding her fee simple title to appellant's real property in Muscogee County.

Appellant contends that we must consider this action for alimony as an in personam proceeding. On this basis, he insists that an alimony judgment cannot be rendered against a non-resident defendant upon service by publication. See *Hammer v. Hammer*, 230 Ga. 711, 198 SE2d 656 (1973); *Hicks v. Hicks*, 193 Ga. 446, 18 SE2d 754 (1942). We recognize that a personal judgment for alimony cannot be rendered against a non-resident defendant upon service by publication. See *Pennoyer v. Neff*, 95 U.S. 714, (1877), *McDonald v. Mabée*, 243 U.S. 90, 37 SC 343 (1916); *Hicks v. Hicks*, supra. However, the present case was converted to an in rem

proceeding and no personal judgment was rendered against appellant.

We think the trial court had jurisdiction to enter the present in rem judgment awarding the appellant's real property in Muscogee County as alimony to appellant's wife in this case. Lack of personal service does not necessarily imply a lack of jurisdiction, and in a proceeding in rem, service may be perfected by a seizure of the res. *Forrester v. Forrester*, 155 Ga. 722, 118 SE 373 (1923). Appellant does not contend that service was not obtained upon him in this case by publication or that he did not know of the seizure of his realty by the receiver before it was awarded by the trial court to his wife as alimony in the final judgment. We find no error in this enumeration.

Appellant also complains that the alimony judgment of the trial court awarded fee simple title to his property to his wife rather than limiting the award simply to the use of the property. In support of this argument, appellant leans upon the language in *Hicks v. Hicks*, supra., at p. 447, that "the extent of available judicial relief in reference to alimony against a non-resident defendant, who is not personally in this state . . . is confined to the seizure and utilization of such property as the defendant may own, situated within the jurisdiction of the court." A casual reading of this language from the *Hicks* opinion lends credence to appellant's argument. However, in Georgia, a wife may be awarded title to her husband's property as permanent alimony. Code Ann. § 30-209. *Elrod v. Elrod*, 231 Ga. 222, 200 SE2d 885 (1973); *Standridge v. Standridge*, 224 Ga. 102, 160 SE2d 377 (1968). Furthermore, alimony awards in in rem proceedings granting the wife fee simple title to the husband's property have been given judicial sanction in prior cases. *Cureton v. Cureton*, 218 Ga. 88, 126 SE2d 666 (1962); *Carter v. Bush*, 216 GA. 429, 116 SE2d 568 (1960).

We find no merit in appellant's enumerations of error and thus will affirm the judgment of the trial court.

Judgment affirmed. All the Justices concur.

APPENDIX B

ORDER DENYING MOTION FOR REHEARING

CLERK'S OFFICE, SUPREME COURT OF GEORGIA

DEAR SIR:

ATLANTA Oct 19, 1976

The motion for a rehearing was denied today:

Case No. 31472, Anthony v. Anthony

Yours very truly,

MRS. JOLINE B. WILLIAMS,
Clerk